No. 14-510

IN THE

# Supreme Court of the United States

MENOMINEE INDIAN TRIBE OF WISCONSIN,
*Petitioner*,

v.

UNITED STATES OF AMERICA, ET AL.,
*Respondents*.

**On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

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## INTRODUCTION

The Menominee Tribe seeks equitable tolling of the statute of limitations on its 1996 through 1998 contract support cost claims for the length of time that the *Cherokee Nation* class action was pending against the Indian Health Service ("IHS"). See *Cherokee Nation of Okla. v. United States*, 199 F.R.D. 357 (E.D. Okla. 2001). Though the facts are complex, the relatively straightforward question at the heart of this case is whether reasonable reliance on class action tolling can ever justify equitable tolling of a statute of limitations.

In *Irwin v. Department of Veterans Affairs*, this Court indicated that equitable tolling, though granted "only sparingly," is justified by "timely filing of a defective class action," suggesting that equitable tolling may be available where class action tolling fails. 498 U.S. 89, 96 & n.3 (1990) (citing *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974)). If such circumstances can ever give rise to an equitable claim for relief, they do in this case.

The facts here are indeed extraordinary:

(1) Menominee's reliance on class action tolling was particularly justified by the Tribe's membership in the *Ramah Navajo Chapter v. Babbitt* class action,[1] a nearly identical and pre-existing class action in which the Government's jurisdictional presentment argument (which would have excluded the Tribe because it had not presented separate administrative claims) was expressly rejected;

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[1] 50 F. Supp. 2d 1091 (D.N.M. 1999).

(2) Menominee was clearly a member of the *Cherokee Nation* putative class as described in the complaint and by the court itself, because the Tribe was listed on the IHS shortfall reports that formed the basis for the class; and

(3) the Tribe was denied the benefit of class action tolling only *after* filing, when the D.C. Circuit held that Menominee could not have been a member of the *Cherokee Nation* class, on the basis of the same presentment argument rejected in *Ramah*.

The Government argues, and the D.C. Circuit held below, that the same jurisdictional facts precluding class action tolling in this case must necessarily preclude equitable tolling as well. But if that were true, neither class action tolling nor equitable tolling could operate as intended. In *American Pipe*, "[this] Court reasoned that unless the filing of a class action tolled the statute of limitations, potential class members would be induced to file motions to intervene or to join in order to protect themselves against the possibility that certification would be denied." *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 349 (1983). As a result, "[t]he principal purposes of the class-action procedure—promotion of efficiency and economy of litigation—" would be frustrated. *Id.*

Despite *American Pipe*, any putative class member relying on class action tolling could find itself in Menominee's position as a result of a later, unpredictable ruling on the proper bounds of the class. Without the protection of equitable tolling for later-excluded parties whose reliance on class action tolling was reasonable and justified, the policy underpinnings of *American Pipe* would be eroded. Reliance on class action tolling would be too risky, and the only prudent course of action for putative class members would be to file

the sort of "protective motions" and "multiplicity of filings" that *American Pipe* sought to avoid. See *American Pipe*, 414 U.S. at 553; *Crown, Cork & Seal Co.*, 462 U.S. at 351.

The standard for equitable tolling as articulated by this Court in *Holland* is satisfied in cases like this one, where the party seeking tolling can demonstrate actual and reasonable reliance on class membership (diligence), followed by a contrary ruling years later rendering class action tolling inapplicable (extraordinary circumstances). *Holland v. Florida*, 560 U.S. 631, 649 (2010). A party that reasonably relies on *American Pipe* tolling only to have the courts narrow its application after the fact is far different from a party that simply sleeps on its rights. Equitable tolling is intended to apply in such extraordinary circumstances in order to "relieve hardships which, from time to time, arise from a hard and fast adherence to more absolute legal rules[.]" *Id.* at 650. Hence, equitable tolling is not precluded merely because class action tolling is held not to apply.

The application of equitable relief must always be determined on a "case-by-case" basis, *id.*, and the unique facts of this case more than justify it: adding to Menominee's reasonable reliance on its membership in the *Cherokee Nation* putative class (in light of the *Ramah* precedent), the Government's widespread and sustained breach of its statutory and fiduciary duties under the Indian Self-Determination Act ("ISDA") (25 U.S.C. § 450 *et seq.*); the Tribe's lack of resources, due in part to the Government's fiduciary breach; the complex and evolving legal landscape, including this Court's momentous decision on contract support cost liability in *Cherokee Nation*; and the lack of any prejudice to the Government all confirm that tolling of the

statute of limitations is the appropriate equitable result in this case.

## ARGUMENT

### I. Menominee reasonably believed that the limitations period had been tolled as a result of the *Cherokee Nation* putative class action.

#### a. Menominee's reliance on *Cherokee Nation* was reasonable in light of *Ramah* and the nature of the class claims.

An unusual and important factor in this case is the existence of a prior, nearly identical class action—*Ramah*—also stemming from the Government's policy decision to systematically underfund contract support costs under the ISDA. Menominee never had to present administrative claims to participate as a class member in *Ramah*, because the *Ramah* court held it was unnecessary. J.A. 37-39.

The Government argues that Menominee should not have relied on the *Ramah* precedent in determining that it was part of the *Cherokee Nation* putative class, because *Ramah* was both "contrary to precedent"—in essence, wrongly decided—and distinguishable. U.S. Br. 19, 35-38. The Government provides a long list of statutory provisions and case law that it claims establish, as a general matter, that presentment is a necessary prerequisite to class membership. U.S. Br. 28-34. But the Government's general statement of the law ignores the far more relevant fact that the *Ramah* court specifically rejected the Government's view.

The *Ramah* court recognized that presentment of administrative claims under the Contract Disputes Act is a jurisdictional prerequisite to filing a complaint in federal court. But since the named plaintiffs in *Ramah*

had filed administrative claims, the court held that it was not necessary for every other class member to do so. J.A. 37-39. The court specifically reached this holding because the action "challenge[d] the policies and practices adopted by the BIA as being contrary to the law and [sought] to make systemwide reforms[,]" and because it would be futile for every class member to submit individual claims. J.A. 38-39. The court thus did not ignore the Government's precedent, but found that it was neither applicable nor persuasive.

Having benefitted from that rule in *Ramah*, there was every reason for the Tribe to assume the same rule would apply in *Cherokee Nation*. The *Cherokee Nation* action also challenged a broad, systemic problem: the class-wide contract support cost underpayments at issue were not isolated incidents of breach of contract, as the Government suggests, but the result of the intentional application of broad agency policies to distribute less than 100% of contract support cost need. See J.A. 129-36. These policies resulted from and implemented the agency's misinterpretation of governing appropriations law, which was directly challenged in *Cherokee Nation* and ultimately rejected by this Court in that very case. *Cherokee Nation v. Leavitt*, 543 U.S. 631, 647 (2005).[2]

As of 1999, moreover, the same shortfall claims alleged in *Cherokee Nation* were added to the *Ramah* class action, removing any meaningful distinction between the cases.[3] See Stipulated Order, *Ramah Navajo Chapter*

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[2] This Court rejected similar arguments by the Bureau of Indian Affairs ("BIA") again in *Ramah*, underscoring the similarity of the cases. *Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181 (2012).

[3] Notably, these claims were added *after* the Contract Disputes Act six-year statute of limitations was adopted in 1994. See

*v. Babbitt*, No. 90-0957 (D.N.M. Sept. 30, 1999), Docket entry No. 347. The Government could have moved to decertify the *Ramah* class upon introduction of the shortfall claims or opposed them on presentment grounds if it believed that such claims were not amenable to class action treatment.[4] In fact, the Government could move at any time to decertify the class on jurisdictional grounds. It has not.

Instead, the Government has relied on the initial *Ramah* class certification order to furnish the district court with jurisdiction to approve settlements extinguishing its liability for contract support cost underpayments, including the *same* shortfall claims at issue in this case. These include a 2002 settlement of shortfall and direct contract support cost claims against the BIA through 1993 and 1994, respectively, and a major proposed settlement now pending with the district court that would settle shortfall claims for 1994 through 2013 in the amount of $940,000,000. Judgment Approving Second Partial Settlement, *Ramah Navajo Chapter v. Jewell*, No. 90-0957 (D.N.M. Dec. 6, 2002), Docket entry No. 731; Order Granting Preliminary

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Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, § 2351(a)(1), 108 Stat. 3322 (codified as amended at 41 U.S.C. § 7103(a)(4)(A)). Accordingly, the *Ramah* shortfall claims were being litigated as a class action under the exact same statutory framework that faced the *Cherokee Nation* court when class certification was sought. See U.S. Br. 38 n.20.

[4] The Government initially objected to the new shortfall claims but then withdrew its objections and consented to their inclusion. The Government threatened to oppose certification of other direct contract support cost claims, but apparently never did so, instead seeking settlement. See *Ramah Navajo Chapter v. Norton*, 250 F. Supp. 2d 1303, 1307 & 1314 (D.N.M. 2002).

Approval of Final Settlement Agreement, *id.*, Docket entry No. 1314.

Some courts have held that a district court has no authority to approve a class settlement when it lacks jurisdiction over the class. See, *e.g.*, *In re Deepwater Horizon*, 732 F.3d 326, 343 (5th Cir. 2013), cert. denied 135 S. Ct. 754 (2014) (a settlement including class members that lacked standing would be unlawful). The parties in *Ramah* have represented to the court in that case that certain claims forms, which must be submitted by class members in order to receive a share of the proposed settlement, will fulfill the presentment requirement. See Affidavit of Co-Class Counsel C. Bryant Rogers, *Ramah Navajo Chapter v. Jewell*, No. 90-0957 (Sept. 29, 2015), Docket entry No. 1313-11, ¶¶ 50 & 51. Those forms will be submitted in 2016 at the earliest (assuming the proposed settlement is quickly approved), but the settlement includes claim years dating back to 1994—meaning that presentment of the claims forms will be outside the six-year statute of limitations for many of those claims. In order for the court to properly exercise jurisdiction over the settlement under the Government's own theory, then, the statute of limitations on those claims must be deemed to have been tolled. Thus, even as the Government claims that Menominee cannot reasonably rely on *Ramah* in seeking equitable tolling of its claims, the Government *itself* has agreed that tolling should apply to many of the claims in that case.[5]

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[5] The Government's presentment theory in *Ramah* also undermines its assertion in this case that presentment, which the Government maintains is a necessary prerequisite for class membership, must be accomplished *prior* to class certification. See U.S. Br. 28-35. That is, if presentment can be satisfied

Having made the decision not to challenge the *Ramah* class with respect to the shortfall claims, it is unreasonable for the Government to now argue that Menominee cannot rely on that case because the grounds for jurisdiction are flawed. Moreover, prior to the *Zuni* ruling in 2007,[6] there was no reason to believe that the *Cherokee Nation* court would not have made the same jurisdictional determination had the court addressed the issue.

**b. Menominee's reliance on class action tolling was reasonable in light of the *Cherokee Nation* certification order.**

Menominee's reliance on class action tolling was justified by the *Cherokee Nation* court's decision on class certification, because Menominee was plainly a member of the putative class as described by that court. Nothing in the *Cherokee Nation* decision indicated that non-presenters were excluded from the putative class; to the contrary, the court indicated that any tribe listed on the IHS shortfall reports as having experienced a shortfall would have been included in the class. *Cherokee Nation*, 199 F.R.D. at 361; Pet. App. 79a (noting that the *Cherokee Nation* court "did not discuss or rely upon" presentment).

The *Cherokee Nation* court ultimately denied class certification because, in its view, the commonality, typicality, and adequate representation requirements of Rule 23 were not met. *Id.* at 366. Such a ruling does not ordinarily preclude putative class members from

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through after-the-fact claims forms in *Ramah*, there is no reason why the same could not have held true in *Cherokee Nation*.

[6] *Pueblo of Zuni v. United States*, 243 F.R.D. 436 (D.N.M. 2007).

the benefit of class action tolling.[7] Indeed, class action tolling is generally "untethered . . . from any necessary connection to the reasons for denying certification." *Smith v. Pennington*, 352 F.3d 884, 892 (4th Cir. 2003). That makes perfect sense, as the policies underlying *American Pipe* do not hinge on the reason class certification is ultimately rejected. Thus, from the point in time when the *Cherokee Nation* class certification was denied until at least 2007, when the *Zuni* court denied class certification on presentment grounds,[8] Menominee had no reason to believe that lack of presentment would have excluded it from the *Cherokee Nation* class or from class action tolling on the basis of that action.[9]

**c. In the absence of later rulings that class action tolling did not apply, Menominee would have benefited from the full class action tolling period to preserve its claims.**

The Government objects that Menominee still could have filed within the original limitations period after certification was denied in *Cherokee Nation*. U.S. Br. 26. Given Menominee's reasonable belief that it was

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[7] See, *e.g.*, *Crown, Cork & Seal Co.*, 462 U.S. at 347-48 (recognizing class action tolling where the original class action had been denied on grounds of typicality, numerosity, and adequate representation); *Davis v. Bethlehem Steel Corp.*, 600 F. Supp. 1312 (D. Md. 1985).

[8] 243 F.R.D. at 443.

[9] The Government notes that Menominee does not challenge, in this case, the D.C. Circuit's determination in *Menominee II* that presentment was a prerequisite for class action tolling in this context. U.S. Br. 28. However, as the Tribe has noted, this Court has never ruled on that question. Pet. Br. 19 n.16. See also 561 U.S. 1026 (denying cert., *Arctic Slope Native Ass'n v. Sebelius*, 583 F.3d 785 (Fed. Cir. 2009) ("*ASNA I*")).

entitled to class action tolling, however, equitable tolling of the full class action tolling period is appropriate.[10]

Class action tolling "stops the clock" for the pendency of the action, up to the point of dismissal or denial of certification, leaving the claimant with the full remaining period once the running of the "clock" is resumed. *E.g.*, *American Pipe*, 414 U.S. at 561; *United States v. Ibarra*, 502 U.S. 1, 4 n.2 (1991) ("when a time bar has been suspended and then begins to run again upon a later event, the time remaining on the clock is calculated by subtracting from the full limitations period whatever time ran before the clock was stopped.") There is no requirement that claims be filed immediately after a period of class action tolling ends. *Abernethy v. United States*, 108 Fed. Cl. 183, 186-89 (2012); *Arivella v. Lucent Techs., Inc.*, 623 F. Supp. 2d 164, 178-80 (D. Mass. 2009).

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[10] The Government also argues that the Tribe's 1996 claim was untimely even assuming the limitations period was suspended for that length of time. U.S. Br. 39. That argument assumes that the 1996 claim accrued on December 31, 1996, but the accrual date is contested. It is the Tribe's position that the claim did not accrue until December 31, 1998, when the Tribe's contract actually expired and the IHS could no longer pay additional funds under the contract. See J.A. 47, 60 (annual funding agreement is incorporated into and becomes part of the underlying contract); J.A. 113 (modification to 1998 annual funding agreement dated September 23, 1998, adding funds for prior fiscal year 1997 covered by ongoing contract). Though the district court ruled against the Tribe on this issue, Pet. App. 38a, the D.C. Circuit did not address it since that court found that equitable tolling was unavailable in any event. The question of the accrual date for the 1996 claim is not now before this Court.

This is so even when a putative member of an uncertified class adopts a "wait-and-see" approach to determine the value of settlement, or to decide at a later date whether it wishes to intervene or file separate claims. *Abernethy*, 108 Fed. Cl. at 188 (rejecting the United States' position that plaintiffs "could have" filed individual claims or intervened in other actions within the original, un-tolled claims period, holding instead that class actions mechanically extend the claims period without such considerations). See also, *Arivella*, 623 F Supp. 2d at 179. Thus, Menominee's reliance on the full class action tolling period was part and parcel of its reasonable reliance on its right to class action tolling as a result of *Cherokee Nation*.

**d. The confluence of the *Ramah* and *Cherokee Nation* class actions with later contrary rulings on presentment created extraordinary circumstances that justify equitable tolling.**

The Government argues that neither the *Ramah* class action nor the apparent availability of class action tolling was an "extraordinary circumstance" that can justify equitable tolling under *Holland* because it was not an "impediment" and did not "prevent" Menominee from filing its claims. U.S. Br. 38-39. Those same arguments were rejected by the Federal Circuit in *Arctic Slope Native Ass'n v. Sebelius*, 699 F.3d 1289 (Fed. Cir. 2012) ("*ASNA II*"). The Federal Circuit correctly reasoned that the precedent set in *Ramah* with respect to presentment and class membership was one of the "unique facts and extraordinary circumstances" that justified equitable tolling in that case. Pet. App. 91a. As the D.C. Circuit recognized below, the facts of this case are analogous and the difference

in outcome is due to the D.C. Circuit's stricter interpretation of the *Holland* test, not to any factual distinctions between the cases.[11] Pet. App. 14a n.5.

The Government relies on and defends the D.C. Circuit's strict "external obstacle" test by arguing that "[t]he requirement of an external obstacle is reflected in the canonical formulation of the 'extraordinary circumstance' test[.]" U.S. Br. 22. From there, the Government reasons: "an extraordinary circumstance that could have 'stood in [the party's] way' (*i.e.*, interposed an obstacle or impediment) so as to 'prevent' the party from timely filing its claim logically requires circumstances beyond the party's control." U.S. Br. 22, quoting C.A. op., Pet. App. 10a (brackets in original).

Establishing that extraordinary circumstances must be "beyond the party's control" to justify equitable tolling does not provide support for the D.C. Circuit's "external obstacle" requirement, nor does it preclude equitable tolling on the facts of this case. Something may be beyond a party's control, but not strictly speaking an "external obstacle" that makes timely filing impossible in the way the D.C. Circuit seems to have required. This distinction is borne out by the cases cited by the Government itself. Some of those cases did not involve any external circumstances affecting a party's decision to file,[12] but others found

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[11] Notably, the Government did not seek this Court's review of the Federal Circuit's decision.

[12] See, *e.g.*, *Tucker v. Kingston*, 538 F.3d 732, 735 (7th Cir. 2008) (petitioner's lack of familiarity with the law not beyond his control); *Kreutzer v. Bowersox*, 231 F.3d 460, 463 (8th Cir. 2000), cert. denied, 534 U.S. 863 (2001) (counsel's confusion about applicable statute of limitations not beyond petitioner's control); *Harris v. Hutchinson*, 209 F.3d 325, 330 (4th Cir. 2000) (counsel's

tolling based on circumstances that were clearly beyond the litigant's control but still did not stand as a direct obstacle that would bar or preclude filing.[13]

Requiring a specific "external obstacle" significantly and unreasonably narrows the circumstances under which equitable tolling can be found to apply, regardless of the equities, and does much more than simply restate the "extraordinary circumstances" test. The "canonical formulation" of the *Holland* test does not require such a rigid interpretation, which would be at odds with the equitable purpose of the test as described in *Holland* itself. 560 U.S. at 650.

Alternatively, the Government appears to assume that to "cause," "prevent," or "stand in the way of" as used in *Holland* means something akin to "make impossible," and therefore some "obstacle" logically must have stood as a substantive or procedural bar that actually precluded the claimant's ability to file. U.S. Br. 38-39 (simply asserting that *Ramah* did not "prevent" the Tribe from filing or "cause" the Tribe to miss the deadline). See also Pet. App. 18a ("none of the many factors the Tribe identifies are *external obstacles that prevented* the Tribe from bringing its claims") (emphasis added). But "prevent" is also defined

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erroneous interpretation of statute not beyond petitioner's control).

[13] See, *e.g.*, *Alvarez-Machain v. United States*, 107 F.3d 696, 700-01 (9th Cir. 1996), cert. denied, 522 U.S. 814 (1997) (recognizing tolling where totality of circumstances, including "numerous, complex issues of first impression—several of which were ultimately decided by the United States Supreme Court," constitute circumstances beyond a petitioner's control); *Downs v. McNeil*, 520 F.3d 1311, 1324-25 (11th Cir. 2008), cert. denied, 135 S. Ct. 70 (2014) (recognizing tolling where attorney lying to client about important legal fact was beyond client's control).

as "to deprive of power or hope of acting or succeeding."[14] "Prevent" can mean not only to "stop," but also to "hinder or impede."[15] BLACK'S LAW DICTIONARY (10th ed. 2014).

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[14] See *Prevent Definition*, MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/prevent (last visited Nov. 16, 2015).

[15] Nothing in the formulation of the equitable tolling rule in *Holland* or other cases suggests that the term "prevented" should be interpreted so narrowly as to require a showing that timely filing was *impossible*. The term "prevented" is not part of this Court's original formulation of the two-part equitable tolling test in *Pace v. DiGuglielmo*, and thus the attribution of that language to *Pace* in *Holland* appears to be in error. See *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005) ("Generally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way."); *Holland*, 560 U.S. at 649 (citing *Pace* and noting "emphasis deleted," although there was no emphasis in *Pace*). Rather, the term "prevented" first appears to have been used by this Court in *Lawrence v. Florida*, 549 U.S. 327, 336 (2007), in which the petitioner sought to toll the one-year statute of limitations under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2244(d)(1). Pursuant to that statutory provision, the start of the one-year limitations period may be delayed until "the date on which the *impediment* to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was *prevented* from filing by such State action." 28 U.S.C. § 2244(d)(1)(B) (emphasis added). See also *Lawrence*, 549 U.S. at 337 (noting that "Lawrence has not alleged that the State *prevented* him from hiring his own attorney or from representing himself.") (emphasis added). The narrow statutory meaning of "prevented" as used in § 2244(d)(1)(B) is not applicable to equitable tolling cases arising under completely different circumstances outside the AEDPA, and there is no reason to suppose that this Court's use of the word "prevented" in *Holland* was meant to import the statutory requirements of § 2244(d)(1)(B).

Here, even though no obstacle made it *impossible* for the Tribe to file its claims at an earlier time, it was hindered from timely filing by events outside of its control. The Tribe reasonably relied on class action tolling, but later rulings rendered such tolling inapplicable. Those rulings were contrary to the law at the time of filing, and to Menominee's own experience in the *Ramah* class. To deny the Tribe the benefit of equitable tolling based on those later rulings would contravene the very policies that gave rise to the *American Pipe* tolling rule in the first place. And to do so in a context where the underlying statutory right to recover reflects Congress' judgment that tribes have no margin to pay administrative fees would produce highly inequitable results.

## II. Filing individual claims was not the easy or inexpensive failsafe measure claimed by the Government.

Regardless of the apparent availability of class action tolling, the Government argues that the diligence necessary for *equitable* tolling required Menominee to file earlier than it did. The Government wrongly dismisses both the "perceived futility" of filing administrative claims and the "risk and expense" of the necessary step of pursuing those claims in litigation. U.S. Br. 40. Those factors, combined with Menominee's reasonable reliance on *Ramah* and *Cherokee Nation*, further contributed to the extraordinary circumstances faced by the Tribe.

The Government has not contested that the IHS surely would have denied Menominee's administrative claims, as it eventually did. A contracting officer's denial triggers a ninety-day deadline to appeal the decision to the agency's Board of Appeals, 41 U.S.C. § 7104(a), or a one-year deadline to file an appeal with

the Court of Claims or a federal district court. 41 U.S.C. § 7104(b); 25 U.S.C. § 450m-1(a). The Government does not contest the fact that Menominee, once its claims were denied, would have had to pursue those appeals in order to preserve its claims. Pursuing individual claims would also have jeopardized Menominee's class membership in the *Cherokee Nation* and, later, *Zuni* class actions.[16] Thus, the Government cannot seriously dispute that filing individual claims entailed much more than an "envelope and a stamp" and did not offer the Tribe a clear path forward given the uncertain legal environment.

The Government's primary response is that "[a]dopting the Tribe's position would establish an unprecedented rule allowing a litigant to ride the coattails of existing litigation and excuse its untimeliness on an open-ended basis until after the validity of its claim was conclusively established." U.S. Br. 40. That is a gross exaggeration, as Menominee seeks tolling only of the time period that class action tolling would have

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[16] There has been some dispute over whether the Government initially took the position in *Cherokee Nation* that the filing of individual claims would render such tribes ineligible for the class, only to reverse course later in *Zuni*, where the Government argued that presentment was a necessary prerequisite. *Compare Menominee Indian Tribe of Wis. v. United States*, 841 F. Supp. 2d 99 (D.D.C. 2012) (Pet. App. 34a-35a), *with Arctic Slope Native Ass'n v. Dep't of Health & Human Servs.*, 11-2 B.C.A. (CCH) ¶ 34,778 (C.B.C.A. 2011) (Bd. J. Steel, dissenting) (finding that the Government changed its litigation position regarding presentment). In any event, pursuing individual appeals certainly would have threatened Menominee's class membership status, and it was not clear that those appeals could be delayed or avoided without penalty after filing at the administrative level. See Pet. Br. 44-46.

allowed—not an "open-ended" period. Moreover, the circumstances of this case are undeniably exceptional.

First, the Tribe's claims resulted from an agency-wide practice involving hundreds of other tribes, with thousands of individual claim years. See *Cherokee Nation*, 199 F.R.D. at 361. The dispute over the extent of the Government's liability for contract support cost shortfalls was a topic of national interest and was being litigated in multiple forums. Both the IHS and the BIA vigorously and consistently denied liability and sought to minimize their responsibilities under the ISDA. See generally, Br. of Nat'l Cong. of Am. Indians as Amicus Curiae Supporting Petitioner.

The Government's demand that every individual tribe present administrative claims on common theories that the IHS had already rejected, and then pursue individual lawsuits to test those same theories, is a self-serving, *post hoc* claim. It strains credulity that the Government actually wanted every tribe to initiate costly and futile administrative proceedings. And there is no doubt that Congress—which acted because Tribes could not afford to shoulder administrative costs and because the agencies had repeatedly violated the letter and spirit of the ISDA—would not have wanted the tribes to undertake this costly and futile effort.

Contrary to the Government's assertions, this was a rare case where pursuing an individual suit was *not* "the only sure way to determine" whether such a suit "could be maintained to a successful result." U.S. Br. 20 (citing *Versluis v. Town of Haskell*, 154 F.2d 935, 943 (10th Cir. 1946)). Pursuing an individual lawsuit would only have wasted time and resources in the lower courts and would not have changed the outcome, which was necessarily dictated by this Court's 2005 decision in *Cherokee*. The Tribe's decision to use the

class action tolling period to determine whether the Court's decision would validate its claims or invalidate them thus shows no lack of diligence on its part.

Second, this case is unique because the Tribe's lack of resources is partly attributable to the failure of the Government to pay the Tribe's contract support expenses—the very subject of the claims. Menominee was a poor tribe made poorer by the Government's failure to live up to its statutory responsibilities and contractual obligations. This was one of the extraordinary circumstances that justify equitable tolling in this case.[17]

The Government responds that the Equal Access to Justice Act ("EAJA") is designed to alleviate any concerns over the cost of litigating ISDA contract claims, and therefore the burdensome expense of litigation should not even be considered. U.S. Br. 44. In fact, the EAJA is narrowly designed to deter the Government from taking an unreasonable litigation position and to avoid punishing a litigant with the costs arising from the Government's unreasonable behavior. Accordingly, a party seeking an award of fees under the EAJA must "allege that the position of the United States was not substantially justified." 28 U.S.C. § 2412(d)(1)(B). Given the state of the contract support cost litigation landscape at the time, the Tribe could hardly have assumed that it would be awarded EAJA fees, even if it qualified as a party eligible

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[17] The Tribe's financial problems were compounded by the fact that the BIA followed the same practices as the IHS in failing to pay the Tribe's contract support expenses. The BIA's actions are the subject of claims by the Tribe as a member of the *Ramah* class action.

to recover fees under that statute. See 28 U.S.C. § 2412(d)(2)(B).

The futility of filing administrative claims or the expense and uncertainty of litigation may not be enough on their own to excuse Menominee's delay in filing, nor did Menominee rely on those factors alone. They are, however, relevant to the equitable analysis and they did impact Menominee's decision not to file *early*, before the time period as extended by class action tolling had run and while the question of liability was pending with this Court. Only after *Zuni* and the Federal Circuit and D.C. Circuit decisions on presentment was it established that Menominee had thereby unwittingly missed the filing deadline. Prior to those rulings, Menominee's course of action was reasonable and, most importantly for equitable tolling purposes, reasonably diligent.[18]

## III. The Government would not be prejudiced by consideration of the Tribe's claims on the merits, since the Government had ample notice of their existence.

The Government would in no way be prejudiced by equitable tolling of the class action tolling period in this case. The IHS was put on clear notice by both the *Cherokee Nation* and *Zuni* class actions, the latter of which was still pending in 2005 when Menominee submitted its individual claims. *ASNA II*, Pet. App. 90a; *Crown, Cork & Seal Co.*, 462 U.S. at 352. The Government is wrong in asserting that these class actions were not sufficient to put the IHS on notice of Menominee's *specific* claims; in fact, Menominee and its potential shortfall damages were individually and

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[18] See Pet. Br. 39 n.30.

specifically listed on the IHS's own shortfall reports, which formed the basis for the *Cherokee Nation* class. *Cherokee Nation*, 199 F.R.D. at 359, 361.

In those reports, the IHS calculated contract support cost shortfalls at the individual tribal level by subtracting the amounts actually paid from the full amount produced by application of the Tribe's indirect cost rate to its contract base funding. J.A. 237-38. Menominee used the same methodology to calculate its shortfall damages in its administrative claims. See Lodged Materials 1-10 (Menominee's requests for Contracting Officer's Decision, referencing the IHS shortfall reports). The IHS was thus fully aware of the existence, basis, and the approximate amount of Menominee's claims as a result of the *Cherokee Nation* class claims.

The Government asserts that it could not have been on notice of the Tribe's claims because the Tribe executed a "release" of those claims. U.S. Br. 48-49. This assertion relies on boilerplate forms that were presented to non-lawyer employees of the Tribe as a routine close-out document when the Tribe's contract covering 1996 through 1998 ended. See J.A. 126, 240-43. At the time, the IHS represented to Menominee that "In order to close out this contract," the form "*must* be signed by officials of your organization and returned to this office." Ex. G, Mem. in Opp. to Mot. to Dismiss, D. Ct. Docket entry No. 36-1 (June 3, 2011) (cover letter sent with claim release forms) (emphasis added).

The effect of the purported release is an issue that has not yet been considered by the district court. However, the purported mandatory release was not legally effective because it is contrary to the ISDA. The Government may not require or benefit from a

contract provision that violates a federal statute,[19] and a member of a statutorily protected class cannot contract away its statutory rights.[20] If anything, the purported release only illustrates the IHS's abuse of authority and disregard of its statutory and fiduciary responsibilities under the tribal-federal relationship as embodied in the ISDA.

Given that the Government had ample notice of the Tribe's claims, it can show no prejudice that would result from the tolling of the statute of limitations.[21] On the other hand, in the absence of tolling Menominee will be deprived of the opportunity to vindicate its statutory and contractual rights under the ISDA.

## CONCLUSION

Menominee's reliance on the class action tolling period in this case was reasonable and justified. Equitable tolling is appropriate to avoid an unjust result in light of the Tribe's reasonable diligence and

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[19] *Beta Sys., Inc. v. United States*, 838 F.2d 1179, 1185-86 (Fed. Cir. 1988); *LaBarge Prods., Inc. v. West*, 46 F.3d 1547, 1552-53 (Fed. Cir. 1995).

[20] See, *e.g.*, *Burnside-Ott Aviation Training Ctr. v. Dalton*, 107 F.3d 854, 858-59 (Fed. Cir. 1997); *Brooklyn Sav. Bank v. O'Neill*, 324 U.S. 697, 704-05 (1954). The purported release was also void for lack of consideration and was likely unconscionable. See *Maynard v. Durham & S. Ry. Co.*, 365 U.S. 160, 162-63 (1961); *In re Currency Conversion Fee Antitrust Litig.*, 361 F. Supp. 2d 237, 251-53 (S.D.N.Y. 2005).

[21] The Government suggests that it would be prejudiced by tolling because the "central purpose" of the statute of limitations is "repose." U.S. Br. 50. That could be said in every tolling case and is tantamount to saying that tolling would prejudice the government by subjecting it to the possibility of losing on the merits. If that were true, tolling would never be possible. *Griffin v. Rogers*, 399 F.3d 626, 638 (6th Cir. 2005).

the extraordinary circumstances it faced. For these reasons, and to preserve the public policies underlying *Holland* and *American Pipe*, Menominee respectfully requests that this Court reverse the ruling of the D.C. Circuit below.

Respectfully Submitted,

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